No. 91-195

In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

WHITNEY BENEFITS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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We have demonstrated in the petition that the court of appeals fundamentally distorted regulatory takings jurisprudence in holding that the Whitney coal was taken upon enactment of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.* First, the finding of a taking at a time when respondents had not even applied for a permit squarely conflicts with *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). Pet. 14-20. Second, it improperly elevates snippets of legislative history to the status of a "legislative taking" and confuses an assertion of regulatory jurisdiction with a statutory exercise of the power of eminent domain. Pet. 20-22. Third, the notion that the mere enactment of SMCRA destroyed all economic value of the Whitney coal is refuted by SMCRA'S simultaneous furnishing of a right to exchange coal underlying an alluvial valley floor (AVF) for federal coal of equal value and by respondents' own efforts to obtain such an exchange, and it is inconsistent

with the holding in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), that the ability to transfer development rights must be considered as mitigating the economic impact of regulation. Pet. 22-25. Fourth, the decision below improperly disregards SMCRA's important purpose of protecting the sensitive hydrology of AVFs while at the same time *preserving* the full economic value of AVF coal. Pet. 25-26.

Respondents for the most part either ignore these points or try to divert attention from them. But they cannot obscure that the decision of the Federal Circuit—which is binding precedent for all regulatory takings claims against the United States—unsettles controlling Fifth Amendment principles and broadly threatens the orderly administration of numerous regulatory programs. Review therefore is warranted.

1. Respondents attempt (Br. in Opp. 9-14) in two ways to avoid this Court's holdings that under a federal regulatory statute—specifically including SMCRA (*Riverside Bayview Homes*, 474 U.S. at 126-127, citing *Virginia Surface Mining*, 452 U.S. at 293-297)—no taking can occur unless and until the owner has applied for a permit to develop its property in a specified manner and the agency has definitively refused to issue one.

a. Respondents first argue (Br. in Opp. 1-3, 9, 11-12, 23-24) that a property owner is excused from applying for a permit if the court entertaining the taking claim finds it "obvious" that the agency would have been required to deny the application. This argument fails even on its own terms, because, contrary to respondents' assertion (Br. in Opp. 2, 3, 11, 13, 22), the Claims Court made no factual finding that it was "obvious" in 1977 that a permit could not be granted to mine any of the Whitney coal. Instead, the Claims Court relied solely on the legislative history of SMCRA, which, in its view, showed that Congress *intended* to prohibit all mining of Whitney coal. Pet. App. 46a-49a, 72a. Respondents have now abandoned any defense of that rationale for finding a "legislative taking" (see Br. in Opp. 25 n.16), and we have

in any event shown it to be indefensible as a matter of both statutory interpretation and Fifth Amendment doctrine. Pet. App. 20-22.[1]

The court of appeals did express the view that a permit application "was obviously and absolutely foredoomed on the day SMCRA was enacted." Pet. App. 5a. But it, too, relied largely on the legislative history. See *id.* at 8a-10a. The only evidence concerning the Whitney tracts that the court of appeals cited was developed at the trial of this case, long after SMCRA was enacted, see *id.* at 7a-8a, and scarcely proves that it was obvious in 1977 that DEQ would have been required to deny a permit to mine any Whitney coal. To the contrary, when respondents requested DEQ to make an AVF determination for the Whitney tracts six years later, they submitted (and DEQ reviewed) extensive data regarding the acreage that "potentially" or "probably" qualified as an AVF and the effect that mining would have on agricultural activities. See DX 23, App. D11; DX 24, 26. Even then, DEQ did *not* find that SMCRA barred mining of all Whitney coal; DEQ found only that a substantial portion of that coal underlies an AVF, and it recommended that the Bureau of Land Management (BLM) approve an exchange for all Whitney coal only because it would be impracticable to mine the remainder. Pet. 7. In short, it was far from obvious when SMCRA was enacted how its AVF provisions would be applied to the Whitney tracts.

Aside from the absence of record support for respondents' position, this Court's decisions contradict any suggestion that a court may excuse a person from seeking a permit under a regulatory statute based on the court's own belief that it would have been futile to do so. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 766 (1975). As the

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[1] Contrary to respondents' contention (Br. in Opp. 20-21), the statutory authorization (30 U.S.C. 1260(b)(5)) for the Secretary to "acquire" AVF coal through the coal-exchange mechanism after enactment of SMCRA (and upon request of the owner) is inconsistent with the notion that such coal had *already* been acquired by the United States when SMCRA was passed.

Court explained in *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 190-191 (1985), the rule that no taking can occur unless a permit is denied "is compelled by the very nature of the inquiry required by the Just Compensation Clause," because the factors relevant to the taking inquiry "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191.[2] That rule also properly reflects the separation of powers under the Constitution. Here, Congress has assigned to an administrative agency the responsibility for applying the general terms of SMCRA to particular tracts on a case-by-case basis. Until the owner has filed for and been denied a permit, the necessary predicate for a compensable taking—action by the only governmental entity that is authorized by SMCRA to "take" property—is wholly lacking. The Federal Circuit, however, has now held that the lower federal courts, which have *not* been authorized by Congress to take property, may nevertheless effectively do so by adjudicating in the first instance how a regulatory scheme applies to particular property and then finding a taking on the basis of that adjudication.

Moreover, as we have explained (Pet. 2, 16), SMCRA provides that *no one* may engage in surface mining without a permit. 30 U.S.C. 1256(a). Respondents make no effort to rebut our analysis (Pet. 16) that unless and until they applied for and were denied a permit, it was this requirement of general applicability, not the AVF restrictions on granting a permit, that barred the mining

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[2] The discussion of futility in *Williamson County*, 473 U.S. at 188, and *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 352, 359 (1986), upon which respondents rely (Br. in Opp. 13 n.5), concerned the distinct question of whether a landowner, having once sought and been denied a permit to develop its property, must submit a revised request. Those cases do not suggest that a taking might be found at a time when the landowner had not submitted any permit application.

of Whitney coal and that therefore was the proximate cause of any "injury" they sustained when SMCRA was enacted. Respondents do not contend—and the courts below did not hold—that this general requirement constituted a taking, since it serves the distinct purpose of preserving the integrity of the regulatory scheme. In fact, this Court has already held that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking," and that "[a] requirement that a person obtain a permit before engaging in certain use of his or her property does not itself 'take' the property in any sense." *Riverside Bayview Homes*, 474 U.S. at 126, 127.[3]

b. There likewise is no merit to respondents' alternative contention (Br. in Opp. 1, 9-10, 11, 12-13, 22) that they satisfied the "final decision" requirement of *Williamson County*, *Riverside Bayview Homes* and *Virginia Surface Mining* by requesting and obtaining a determination from DEQ about the extent of the AVF and the effect of mining on agricultural production.[4] Respondents did not request and receive the AVF determination until 1983 (in order to satisfy the statutory prerequisite for a coal exchange), yet they insist that the Whitney coal was taken when SMCRA was passed in 1977. Thus, respondents apparently regard a final administrative decision as a mere *procedural* prerequisite to filing a claim for compensation under the Tucker Act. Cf. *Stevens* v. *Department of Treasury*, 111 S. Ct. 1562 (1991). Con-

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[3] Despite respondents' efforts to portray the decision below as carving out only a narrow exception to this rule, it will almost always be possible (as this case well illustrates) to contend that it was obvious from the outset that the statute required denial of a permit. The decision below therefore invites widespread circumvention of the administrative process.

[4] DEQ considered only the physical characteristics of the Whitney tracts, not an actual application for a permit to mine (see DX 23, at 2 (C.A. App. 6435)); DEQ might well have denied such a permit, in whole or in part, for reasons other than (or in addition to) SMCRA's AVF restrictions.

trary to respondents' view, however, the denial of a permit is a *substantive* prerequisite to the very existence of a taking; indeed, it *is* the taking (if there is a taking at all) under a federal regulatory statute.

2. Respondents contend (Br. in Opp. 10-11, 12-13, 23-24) that *Kirby Forest Industries* v. *United States*, 467 U.S. 1 (1984), allowed the courts below to select a date of taking prior to the denial of a permit. This contention cannot be squared with *Virginia Surface Mining* and *Riverside Bayview Homes*, which were decided before and after *Kirby Forest*, respectively, or with *Danforth* v. *United States*, 308 U.S. 271 (1939), which was cited with approval in *Kirby Forest*, 467 U.S. at 11-12 & n.17, 15. As we have explained (Pet. 17), and as respondents do not deny, *Danforth* specifically rejected the contention that the mere enactment of a statute providing for implementing action by Executive officials constituted a taking of property. 308 U.S. at 286.

Moreover, in *Kirby Forest* itself, the Court held that a taking did *not* occur prior to the usual time (payment of compensation) under the method of taking there involved (straight condemnation). Respondents rely (Br. in Opp. 10-11) on the Court's statement that there was no interference with the owner's property severe enough to amount to a taking because the government was not authorized to restrict its use prior to paying compensation. 467 U.S. at 14-15. Respondents contend that in this case, SMCRA's AVF provisions did restrict the use of their property and did deprive them of all economic value immediately upon enactment. But as we have explained, it was the general prohibition against mining without a permit (which respondents do not challenge), not the AVF restrictions, that barred mining of Whitney coal upon enactment of SMCRA. Moreover, even if the AVF restrictions had been applied to the Whitney tracts at that time, they would have preserved the full economic value of any AVF coal the tracts contained. See pages

7-10, *infra*. Like the property owners in *Kirby Forest*, 467 U.S. at 15, if respondents did not want to realize that value themselves, they could have sold their property for its fair market value.

3. The illogic and unfairness of respondents' position are made manifest by their response to our submission that the Court should grant review to prevent the uncertainty and disruption that will ensue as a result of the six-year statute of limitations on Tucker Act claims under 28 U.S.C. 2501. As we have explained (Pet. 27-28), under the holding below that a taking occurred upon enactment of SMCRA in 1977, similarly situated owners of AVF coal would now be time-barred from seeking compensation, and property owners will find it necessary in the future to file taking claims soon after a regulatory measure is enacted, even if they have no current plans to develop their property. Respondents do not deny that such consequences weigh strongly in favor of certiorari. But in a creative attempt to avoid review, they suggest (Br. in Opp. 24 n.15) that even where a taking allegedly occurred upon enactment of a regulatory measure, the statute of limitations should not begin to run until a permit is denied. Respondents and those similarly situated cannot have it both ways. Under 28 U.S.C. 2501, a suit must be filed within six years of when the claim "first accrues," which in this setting is when the taking occurs. In respondents' view, a taking occurred here when SMCRA was enacted, which no doubt explains why they filed this suit exactly six years later. By contrast, under respondents' new position, a property owner could wait for decades after enactment of a regulatory statute to apply for a permit, and then if it is denied, seek compensation plus interest from the date the statute was passed. That rule would invite sandbagging of the government and resultant distortion in the regulatory process.

4. Respondents continue to insist (Br. in Opp. 14-19) that the Whitney coal retained no economic value after

enactment of SMCRA. But as we have shown (Pet. 22), the very same paragraph of SMCRA that restricts mining in an AVF affords a person who is unable to mine by virtue of those restrictions a right to exchange his AVF coal for federal coal of equal value. 30 U.S.C. 1260 (b)(5). This guarantee not only refutes as a matter of law respondents' contention that the mere enactment of SMCRA effected a taking (see Pet. 23 n.21); it also conforms to the very measure of just compensation that respondents invoke: "a full and perfect equivalent for the property taken." Br. in Opp. 17 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 150 (1974)).

Respondents' detailed discussion (Br. in Opp. 4-8, 16 n.8, 18-19) of the subsequent unfolding of the coal-exchange process is legally irrelevant to their contention that the Whitney coal was taken in 1977. Despite the court of appeals' invitation on the first appeal (Pet. App. 83a-84a), respondents never amended their complaint to allege a taking at a later time, such as whenever they claim to have abandoned faith in the coal-exchange process; and respondents in fact have not abandoned that process, since they have refused to either accept or reject BLM's outstanding offer of the Ash Creek tract. Pet. 9.

At bottom, respondents' dissatisfaction with the coal-exchange process to date stems from their desire to shift to the government the consequences of what they concede (Br. in Opp. 8) to have been a significant decline in the coal market since SMCRA was passed in 1977. Respondents contend (Br. in Opp. 8 n.4) that they are entitled to receive a quantity of coal whose total value *today* equals that of the Whitney coal *in 1977*. The result would be to require BLM to convey to respondents a quantity of federal coal far in excess of the quantity of Whitney coal they could reasonably expect to mine. That is, to put it mildly, an odd view of an equal exchange, and BLM has refused to accede to it. But BLM *does* stand ready to enter into a fair exchange by conveying coal that is equal in quantity and quality to the Whitney coal.

Surely no more is required to negate the claim that SMCRA has resulted in a taking of respondents' property.

By contrast, respondents would receive a windfall under their position that there was a taking of all Whitney coal in 1977 and that they now are entitled to receive (in cash or coal) the $140 million that represents the full value of all Whitney coal as of 1977, plus interest. Respondents concededly had no plans in 1977 to engage in the extensive mining described in the hypothetical, litigation-generated plan on which the courts below predicated their finding of a taking; to the contrary, they had withdrawn their 1976 application for a permit for far more modest mining on East Whitney alone. Nor did respondents thereafter seek a permit to mine Whitney coal as provided in the hypothetical plan, which contemplated an unprecedented diversion of the Tongue River. Pet. 5-6, 9 n.10, 11 n.12. The judgment below therefore does not rest on respondents' "reasonable investment backed expectations." *Hodel* v. *Irving*, 481 U.S. 704, 714 (1987).[5] Respondents' failure to realize whatever additional value the Whitney coal might have had in 1977

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[5] Contrary to respondents' contention (Br. in Opp. 26 n.18) that our claim of a "windfall" depends on a factual issue that we lost in both lower courts, neither court addressed whether respondents ever expected to mine Whitney coal to the extent the courts hypothesized. See Pet. 11 n.12. In fact, ignoring the test in this Court's regulatory takings decisions, the court of appeals did not address respondents' investment-backed expectations at all. Respondents cite (Br. in Opp. 26 n.18) testimony by PKS's vice president that it was industry practice for an operator to apply for a permit to meet present needs and then seek an amendment if it has entered into additional supply contracts. Tr. 764. But the same witness testified that PKS had no firm plans in 1977 to mine Whitney coal to the extent contemplated by the hypothetical Boyd Plan or to conduct any mining at all on West Whitney. Tr. 759-760. Moreover, in answers to interrogatories in connection with its 1976 permit application, PKS represented that it did not have "any plans, proposals, or intention of expanding the proposed Whitney Mine beyond the size stated" in its application. DX 13, at 54.

is attributable to their own delay in developing that coal and the ensuing decline in the coal market, not SMCRA's AVF provisions.

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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